Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

IMAD NAIM SAADEH,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition For Writ Of Certiorari
To The Seventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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77 pp

ISSUES PRESENTED

I.

Should this Court grant *certiorari* to resolve inter-circuit and intra-circuit conflicts concerning the correct standard of review to be applied on direct federal appeal of the question of whether a suspect is "in custody" for *Miranda* purposes?

II.

Was the petitioner "in custody" for *Miranda* purposes where law enforcement agents, acting without a warrant, broke into an auto repair shop with a battering ram and an officer, armed with a machine gun, ordered the petitioner to the ground, displaced the petitioner to another area of the auto repair shop whereupon the petitioner was frisked, dispossessed of his belongings and interrogated about the ownership of a toolbox containing incriminating evidence absent the giving of *Miranda* warnings?

III.

Did an auto repair facility secretary's general consent to search the 42,000 foot business premises authorize law enforcement agents to search, absent a warrant, the petitioner's locked toolbox within the premises where the secretary had no control over or access to the locked toolbox; and did the appellate court err in holding that the petitioner's failure to object to the search undercut his

ISSUES PRESENTED – Continued

Fourth Amendment challenge where the requirement of objection would require one to sacrifice his Fifth Amendment privilege against self-incrimination to assert Fourth Amendment protection and other courts of appeal have refused to attach legal significance to the failure to object?

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PRAYER

Petitioner Imad Naim Saadeh respectfully prays that a writ of *certiorari* issue to review the judgment and order of the Seventh Circuit. In the alternative, Petitioner Imad Saadeh respectfully moves this Honorable Court to vacate the Seventh Circuit's judgment for further consideration in light of this Court's expected decision in *Thompson v. Keohane*, No. 94-6615, or grant any other appropriate relief.

OPINIONS BELOW

The district court's opinion denying Petitioner Imad Naim Saadeh's motion to suppress statements is not published. The district court's opinion denying Saadeh's motion to suppress evidence can be found at 1992 WL 162959, and is attached in Appendix B. The Seventh Circuit's opinion affirming Saadeh's criminal conviction is published at 61 F.3d 510, and is attached in Appendix A.

JURISDICTION

On July 20, 1995, a panel of the Seventh Circuit affirmed Saadeh's conviction for conspiracy to possess a controlled substance with intent to deliver, 21 U.S.C. § 846. On September 7, 1995, the court denied Saadeh's timely filed petition for rehearing and suggestion for rehearing *en banc*. Appendix C. This petition is filed within 90 days of the order affirming Saadeh's criminal

conviction and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

The conspiracy charge emanated from a two day reverse sting operation during which Petitioner Imad Saadeh and Co-Defendants Albert Sudzus, Jr. and Barbara Sudzus allegedly attempted to purchase five kilograms of cocaine from an informant for $50,000. Government agents culminated the investigation by entering Euro-Tech (a large auto repair facility in Chicago) without a warrant and conducting searches and

seizures. Prior to trial, Saadeh filed a motion to suppress evidence seized during the searches, and a motion to suppress statement (based upon an undisputed failure to recite *Miranda* rights prior to questioning). The district court did not hold an evidentiary hearing on Saadeh's motion to suppress statements as the parties stipulated to the underlying facts.

On February 11, 1992, when government agents initially appeared at Euro-Tech, Barbara Sudzus refused entry. R. 133, 149. The agents, acting without a warrant, entered the premises by using a battering ram and breaking the front glass doors. R. 133, 149. After the agents broke down the front doors, they pulled their guns. R. 133, 149.

A total of eight persons were in the shop. R. 149. Everyone except Barbara Sudzus had gone to the back area of Euro-Tech. R. 149. Barbara Sudzus remained in the front office area. R. 149. Some officers stayed outside to prevent people from escaping from the numerous exits in the building. R. 149.

One of the agents cloaked in a jacket emblazoned with the words "DEA" and armed with a machine gun went to the back of the shop and yelled to Saadeh, "Get down, get down, get down, mother fucker, get on the floor." R. 133. When Saadeh started to get down on his knee caps, the agent commanded, "No, lay down." R. 133. Saadeh complied. R. 133. Agents then ordered Saadeh to move by a car in the body shop area. R. 133. The officers placed six or seven other persons, faces down to the ground, by this car. R. 133.

The officers allowed the individuals lying down by the car to stand up, one at a time. R. 149. The officers frisk searched each person for weapons. R. 149. The officers also required each person to empty his pockets and set his belongings on the car. R. 149.

While officers were securing the individuals in the shop area, DEA Agent William Maloney was in the front office obtaining permission from Barbara Sudzus to search the building. R. 149. After Barbara Sudzus allegedly signed a consent-to-search form, Agent Maloney walked to the garage area and informed the agents that he had obtained permission to search the building. R. 149.

After being informed of the consent to search, Schaumburg Police Department Detective Egan walked over to a large red toolbox that a government informant had previously described as normally containing a gun and money. R. 149. The box was approximately 25 feet from the car next to which the building's occupants were standing. R. 149. After discovering that some of the drawers were locked, Egan turned around and asked the people by the car, "Whose toolbox is this?" R. 149. No one responded, but two of the men looked at Saadeh. R. 149.

Detective Egan walked over to Saadeh, gestured toward the toolbox and asked, "Is this yours?" R. 149. Saadeh responded, "Yeah." R. 149. Egan next asked, "You got the keys?" R. 149. Saadeh did not respond. R. 149. Egan picked up keys from the top of the car and asked Saadeh, "Are these the keys?" R. 149. Saadeh did not respond. R. 149. Egan opened the tool box with one of the keys and found approximately $35,000 in cash. R. 149.

Egan did not recite *Miranda* warnings prior to questioning Saadeh. R. 133, 149. The government admitted that Saadeh was not free to leave at the time of the questioning, but claimed that Saadeh had not been placed under arrest. R. 149.

District Judge Aspen found Saadeh's motion to suppress statements "sound" and not "a particularly easy question to decide." Tr. 218-220. Judge Aspen assumed Saadeh "was in custody at the time of the colloquy about the key to the tool box." Tr. 218. Judge Aspen, however, concluded that *Miranda* warnings were not required on grounds that the agents could have "broken into the tool box and obtained its contents, [but] . . . chose a less violent means of doing so by inquiring if anybody had a key to the tool box and opening it that way." Tr. 220. Based upon this finding, Judge Aspen denied Saadeh's motion to suppress statements.

Having successfully opposed Saadeh's motion to suppress statement, the government introduced the contents of Saadeh's statement at trial. Detective Egan testified that Saadeh admitted that the tool box was his. Tr. 440, 446-48. During both its opening and rebuttal closing arguments, the government stressed that Saadeh admitted in his "own words" that he owned the tool box where the officers recovered the money. Tr. 583, 638.

On appeal, Saadeh contested the district judge's denial of his motion to suppress. In response, the government conceded that interrogation had occurred, but argued that Saadeh was not in custody at the time of the questioning. In ruling upon the *Miranda* issue, the Seventh Circuit panel, Judge Flaum writing, reviewed the district court's denial of the motion to suppress statements for "clear error." *United States v. Saadeh*, 61 F.3d

510, 519 (7th Cir. 1995). In a petition for rehearing with suggestion for rehearing *en banc*, Saadeh pointed out that the panel's finding concerning the standard of review conflicted with prior Seventh Circuit and precedent from other circuits. The court ordered the government to respond, and later denied the petition for rehearing. Appendix C.

REASONS FOR GRANTING THE PETITION

I. *CERTIORARI* SHOULD BE GRANTED TO RESOLVE THE CLEAR AND IDENTIFIED INTER-CIRCUIT AND INTRA-CIRCUIT SPLIT OVER THE STANDARD OF REVIEW TO APPLY TO THE QUESTION OF WHETHER A DEFENDANT IS "IN CUSTODY" FOR *MIRANDA* PURPOSES.

As part of the Seventh Circuit's "apparent desire to be the most proactive court in the country on questions of expanding deferential review," *United States v. Baldwin*, 60 F.3d 363, 367 (7th Cir. 1995) (Flaum, J., dissenting from denial of rehearing *en banc*), the Seventh Circuit panel in this case expressly found that a district judge's ruling on the *Miranda*-based motion to suppress statements should be reviewed only for "clear error." *United States v. Saadeh*, 61 F.3d 510, 519 (7th Cir. 1995).[1] *See also United States v.*

[1] In applying a clear error standard, the panel cited *United States v. Burns*, 37 F.3d 276 (7th Cir. 1994), and *United States v. McCarthur*, 6 F.3d 1270 (7th Cir. 1993). *MaCarthur* involved a Fourth Amendment suppression question, rather than a *Miranda* issue. *Burns* contained both Fourth and Fifth Amendment issues, and at the outset of its analysis, the panel, citing *MaCarthur*, generally stated, "We review the district court's denial of a motion to suppress for clear error." *Burns*, 37 F.3d at 278.

Kelly, 991 F.2d 1308, 1311 (7th Cir. 1993) (reviewing the district court's factual and legal determinations on *Miranda* issues for clear error). The Seventh Circuit's ruling in this case allows a plain and unresolved intra-circuit conflict to fester. In *United States v. Hocking*, 860 F.2d 769 (7th Cir. 1988), the court stated that a *Miranda*-related determination "of whether there was a custodial interrogation is a mixed question of law and fact" subject to independent appellate review. *Id.* at 772. Additional Seventh Circuit cases have opted for a *de novo* standard of review of *Miranda* claims on direct appeal. *See United States v. Humphrey*, 34 F.3d 551, 554 (7th Cir. 1994); *United States v. Menzer*, 29 F.3d 1223, 1230 (7th Cir. 1994); *United States v. Fazio*, 914 F.2d 950 (7th Cir. 1990). In other opinions and cases, judges of the Seventh Circuit have questioned the correct standard of review to be applied to *Miranda* claims, absent resolving the split. *See United States v. Humphrey*, 34 F.3d 551, 558-559 (7th Cir. 1994) (Posner, C.J., concurring) (notwithstanding circuit precedent, arguing that the standard of review for *Miranda* custody determinations should be clear error); *United States v. Taylor*, 31 F.3d 459, 468 (7th Cir. 1994) (Ripple, J., concurring and dissenting) (questioning the "assumption in recent times that the deferential standard used to review Fourth Amendment suppression motions is applicable *ex proprio vigore* to review of mixed questions of law and fact"); *United States v. Jones*, 21 F.3d 165, 169 (7th Cir. 1994) (identifying the intra-circuit split over the standard of review for *Miranda* claims, but not resolving the issue); *United States v. Levy*, 955 F.2d 1098, 1103-04 n. 5 (7th Cir. 1992) (questioning the viability of a *de novo* standard of review for *Miranda* claims).

Not only is there a conflict within the Seventh Circuit, but other courts of appeal have divided over the standard of review applicable to *Miranda* points on direct appeal. *See Jones*, 21 F.3d at 169 n. 5 (citing cases) Some circuits review *de novo* the legal conclusion of whether the government subjected a defendant to custodial interrogation (so as to require *Miranda* warnings). *See, e.g., United States v. Adams*, 1 F.3d 1566, 1575 (11th Cir. 1993); *United States v. Soto*, 953 F.2d 263, 264 (6th Cir. 1992) (*per curiam*); *United States v. Kirsteins*, 906 F.2d 919, 923 (2nd Cir. 1990); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986). Other circuits have applied a clear error standard. *See, e.g., United States v. Leshuk*, ___ F.3d ___, No. 94-5839, Slip op., 1995 WL 550463 (4th Cir. 1995); *United States v. J.H.H.*, 22 F.3d 821, 831 (8th Cir. 1994). *See also People of the Territory of Guam v. Palomo*, 35 F.3d 368, 375 (9th Cir. 1994) ("We review de novo the denial of a motion to suppress. Whether a person is in 'custody' for purposes of *Miranda* is essentially a question of fact reviewed for clear error.") (citation omitted).

Cases opting for the clear error standard can be said to deviate from this Court's holdings in cases such as *Miller v. Fenton*, 474 U.S. 104 (1985), *Mincey v. Arizona*, 437 U.S. 385, 401 (1978), *Davis v. North Carolina*, 384 U.S. 737, 741-42 (1966), *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963) and *Ashcraft v. Tennessee*, 322 U.S. 143, 147-48 (1944). These cases bode in favor of applying a *de novo* standard of review to the mixed legal and factual determinations such as whether a defendant was "in custody" for *Miranda* purposes. For instance, in *Miller*, this Court, looking to prior case law, congressional intent underlying the habeas corpus statute and the character of the claim,

held that a state court's determination that the State obtained a voluntary confession cannot be presumed correct and must be subjected to independent federal review.

Like the voluntariness point at issue in *Miller*, the mandate that a subject in custody must given *Miranda* warnings before being interrogated derives from the Fifth Amendment privilege against self-incrimination, applicable to the States through the Fourteenth Amendment's due process clause. The due process root of an involuntariness claim formed a basis for the result in *Miller*. Moreover, like a claim of involuntariness, the question of whether a suspect is in custody for *Miranda* purposes amounts to a mixed legal and factual question for which independent review is appropriate. *See Townsend v. Sain*, 372 U.S. 293, 309 (1963).

During this term, this Court is expected to rule upon an issue related to the one here. This Court has granted *certiorari* in *Thompson v. Keohane*, No. 94-6615, and is anticipated to determine whether federal courts in habeas corpus cases must independently review the determination that a suspect was in custody for *Miranda* purposes. Like the *Miranda*-related standard of review issue in this case, the circuits have split over this issue. *See* 57 CrL 3145 (1995).

The issue in this case differs from *Thompson v. Keohane* in that, as opposed to being a habeas corpus case, this case involves the standard of review to be applied on direct appeal. Judicial confusion presently exists over whether the habeas corpus standard of review should be applied to like claims on direct appeal. *See United States v. Baldwin*, 60 F.3d 363 (7th Cir. 1995). In *Baldwin*, Chief

Judge Posner, joined in opinion by Judge Kanne, overruled Seventh Circuit precedent and held that the independent review standard articulated in *Miller v. Fenton* 474 U.S. 104 (1985), does not apply to direct appeal claims of involuntariness. The *Baldwin* court ruled that involuntariness claims only should be reviewed for clear error.[2] The decision drew a concurrence from Senior Judge Fairchild who questioned whether the decision comported with this Court's decision in *Miller*. In addition, Judges Flaum, Ripple and Rovner dissented from the denial of rehearing *en banc* and queried whether the court had properly followed Supreme Court precedent.

More generally, judicial confusion and conflicts exist over the correct standard of review to be applied to mixed questions of law and fact. In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court noted that the circuits had split on the standard of review applicable to mixed questions of law and fact, but identified:

> support in decisions of this Court for the proposition that conclusions on mixed questions of law and fact are independently reviewable by an appellate court. Bogardus v. Commissioner, 302 US 34, 39, 82 L Ed 32, 58 S Ct 61 (1937); Helvering v. Tex-Penn Oil Co., 300 US 481, 491, 81 L Ed 755, 57 S Ct 569 (1937); Helvering v. Rankin, 295 US 123, 131, 79 L Ed 1343, 55 S Ct 732 (1935). But cf., Commissioner v. Duberstein, 363 US 278,

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[2] The court reached this holding absent oral argument, with limited briefing and without an in-person conference among the judges.

289, 4 L Ed 2d 1218, 80 S Ct 1190 (1960); Commissioner v. Heininger, 320 US 467, 475, 88 L Ed 171, 64 S Ct 249 (1943).

Pullman-Standard v. Swint, 456 U.S. at 289 n. 19. *But see United States v. Humphrey*, 34 F.3d 551, 558 (7th Cir. 1994) (Posner, C.J., concurring) ("this court has been a leader in insisting that clear error is the correct standard for all so-called mixed questions of law").

In sum, it is clear that inter-circuit and intra-circuit conflicts exist over an important and often occurring issue of criminal and appellate procedure. To promote uniformity of judicial decision across the nation, this Court should grant *certiorari*. *Certiorai* should be granted to determine whether the standard to be announced in *Thompson v. Keohane*, No. 94-6615, also should apply on direct appeal,[3] and the appropriate standard of review for mixed questions of law and fact. In the alternative, Petitioner Imad Saadeh respectfully moves this Honorable Court to vacate the Seventh Circuit's judgment for further consideration in light of this Court's expected decision in *Thompson v. Keohane*, No. 94-6615.

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[3] Parenthetically, we note that the standard of review for sufficiency of the evidence claims in habeas cases, *Jackson v. Virginia*, 443 U.S. 307 (1979), uniformly been applied to direct appeal sufficiency of the evidence claims.

II. THE SEVENTH CIRCUIT PANEL'S DETERMINATION THAT THE PETITIONER WAS NOT "IN CUSTODY" FOR *MIRANDA* PURPOSES IS FACTUALLY UNSUPPORTED AND CONFLICTS WITH PRIOR DECISIONS FROM THIS COURT AND COURTS OF APPEAL.

In the district court, the government stipulated that Saadeh was not free to leave when he was questioned, and the district judge assumed that Saadeh was in custody. Nonetheless, the Seventh Circuit panel found Saadeh was not "in custody" for *Miranda* purposes. *United States v. Saadeh*, 61 F.3d 510, 519-20 (7th Cir. 1995). In so holding, the panel ignored essential facts, plainly exhibiting that a reasonable person would have felt confronted with restraints associated with arrest and not free to leave. *E.g.*, *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

The stipulated facts showed the following. Just before the questioning, a slew of government agents forced entry into Euro-Tech. A police officer, armed with a machine gun, ordered Saadeh to lay on the ground. Saadeh was detained from the moment law enforcement agents encountered him. Upon the directive of a police officer, Saadeh was moved to another area. There, the officers allowed Saadeh to stand, only to be patted down and dispossessed of his personal belongings which were placed on top of a vehicle. At that point, the detective asked questions about ownership of the tool box absent giving *Miranda* warnings. Before that time, Saadeh was not told he was free to leave (because, as the government stipulated, he was not). In fact, Saadeh was not released from custody at any later time on the day in question.

The Seventh Circuit's holding that these facts did not amount to a custodial situation conflicts with prior decisions from this Court, the Seventh Circuit and other courts of appeal in which custody for *Miranda* purposes has been found under facts equally or less compelling than those here. *See New York v. Quarles*, 467 U.S. 649 (1984) (Court agrees with lower court's conclusion that defendant was in custody for *Miranda* purposes where a woman described an alleged rape assailant, stated that she saw him enter a grocery store carrying a gun and a police officer encountered the defendant in the grocery store, ordered him to stop, frisked him, handcuffed him and asked about the location of the gun); *Orozco v. Texas*, 394 U.S. 324 (1969) (defendant questioned on his bed in a rooming house was not free to leave and therefore *Miranda* warnings were required); *United States v. Perdue*, 8 F.3d 1455, 1464-65 (10th Cir. 1993) (officers who drew their weapons and forced defendant to the ground while conducting a *Terry* stop created a custodial situation requiring the giving of *Miranda* warnings); *United States v. Griffin*, 7 F.3d 1512, 1519 (10th Cir. 1993) (drug suspect who was separated from her friend, led to an office in the airport and not informed she was free to leave was in custody; therefore, *Miranda* warnings were required); *United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir. 1993) (Defendant Stewart was in custody for *Miranda* purposes where police removed him from a taxicab, patted him down, placed him in handcuffs and directed him to the side of the road); *United States v. Adams*, 1 F.3d 1566, 1575 (11th Cir. 1993) (defendant was in custody and *Miranda* warnings were required where police forced the defendant to lie down at gun point, took possession of his

suitcase and plane ticket and did not inform him that he was free to go); *United States v. Henley*, 984 F.2d 1040, 1043 (9th Cir. 1993) (although defendant was not under arrest, he was nonetheless in custody for *Miranda* purposes when he was handcuffed and questioned while in the back of a police car); *United States v. Griffin*, 922 F.2d 1343 (8th Cir. 1990) (defendant was in custody even though agents spoke to the defendant, a bank robbery suspect, in privacy of his own home, and did not draw their guns or handcuff him); *Fleming v. Collins*, 917 F.2d 850, 853 (5th Cir. 1990) (reasonable person "crouched on ground and held at gunpoint by a citizen and then by a police officer [] would have understood the situation to constitute requisite restraint on movement" so as to require the giving of *Miranda* warnings); *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989) (defendant was in custody and should have been given warnings when postal inspectors questioned him at his place of business); *United States v. Longbehn*, 850 F.2d 450 (8th Cir. 1988) (defendant who was detained at his place of employment beyond usual work hours and compelled to open his home to a search by law enforcement officers was in custody for *Miranda* purposes); *United States v. Beraun-Panez*, 812 F.2d 578, 582, *amended*, 830 F.2d 127, 127-28 (9th Cir. 1987) (defendant who was questioned at his place of business was in custody); *United States v. Mahar*, 801 F.2d 1477, 1500 (6th Cir. 1986) (same); *United States v. Scharf*, 608 F.2d 323 (9th Cir. 1979) (defendant who had been surrounded by several police officers and questioned in a police car was in custody under *Miranda*); *United States v. Lee*, 699 F.2d 466 (9th Cir. 1982) (even though agent informed the defendant that he was free to leave, defendant who agreed to

be interviewed in FBI agent's car was in custody for *Miranda* purposes); *United States v. Warren*, 550 F.2d 219, 225 (5th Cir. 1977) ("[t]here is no question that all the defendants had been sufficiently deprived of their freedom such that *Miranda* warnings should have been given" when armed agents questioned the defendants after the agents boarded a ship for inspection purposes, moved the defendants to the fantail and seized the defendants' lawfully possessed weapons); *United States v. Phelps*, 443 F.2d 246 (5th Cir. 1971) (defendant found to be in custody where four police officers entered the defendant's place of his business, discovered an illegal weapon and began questioning him absent the giving of warnings).

The Seventh Circuit in this case ruled that "[a] person detained during the execution of a search warrant is normally not in custody for *Miranda* purposes."[4] *Saadeh*, 61 F.3d at 520. *See United States v. Burns*, 37 F.3d 276 (7th Cir. 1994) (same). *See also United States v. Leshuk*, ___ F.3d ___, No. 94-5839, Slip op., 1995 WL 550463 (4th Cir. 1995) (suspect is not in custody for *Miranda* purposes during a *Terry* stop). While this Court has ruled that *Miranda* warnings are not required during a routine roadside traffic stop, *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court has never created a bright line rule exempting law enforcement officers of the duty to administer *Miranda* warnings in coercive situations such as the one at bar. Such a bright line rule is not in congruence with this

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[4] While the court so summarized its holding, there was no search warrant in this case.

Court's test for determining custody for *Miranda* purposes, e.g., *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (custody for *Miranda* purposes occurs when there is restraint on freedom of movement to the degree associated with formal arrest), and *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (custody occurs when an individual has been taken into custody "or otherwise deprived of his freedom of action in any significant way"), and conflicts with the decisions noted above in which courts have deemed a suspect in custody for *Miranda* purposes under circumstances even less coercive than those facing the petitioner here.

Certiorari should be granted to resolve the conflict between this case and the cases cited above. In addition, the issue of whether a person can be "in custody" for *Miranda* purposes during a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1967), but more intrusive than a routine roadside traffic stop, is one that reoccurs in the lower courts and needs resolution by this Court.

III. THE SEVENTH CIRCUIT'S DECISION THAT A THIRD PARTY HAD THE AUTHORITY TO CONSENT TO A WARRANTLESS SEARCH OF THE PETITIONER'S LOCKED TOOLBOX IS FACTUALLY UNSUPPORTED AND IN CONFLICT WITH PRIOR COURT OF APPEALS DECISIONS. FURTHER, THE SEVENTH CIRCUIT'S FINDING THAT THE PETITIONER'S FAILURE TO OBJECT TO THE SEARCH UNDERCUT HIS CHALLENGE TO THE THIRD PARTY'S GENERAL CONSENT SETS A DANGEROUS PRECEDENT IN THAT IT REQUIRES A PARTY TO SACRIFICE HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT TO ASSERT HIS FOURTH AMENDMENT RIGHTS, IS IN CONFLICT WITH DECISIONS FROM OTHER COURTS OF APPEAL THAT HAVE REFUSED TO ATTACH SIGNIFICANCE TO A PARTY'S FAILURE TO OBJECT TO A SEARCH AND IS FACTUALLY INAPPROPRIATE SINCE THE PETITIONER WAS NOT MADE AWARE OF THE THIRD PARTY CONSENT.

The agents did not have a warrant to search Imad Saadeh's toolbox. Saadeh did not verbally consent to a search of his toolbox, nor did he sign a written consent to search form. Nonetheless, the panel held Barbara Sudzus, a secretary at Euro-Tech, had the authority to consent to a warrantless search of Imad Saadeh's locked toolbox. (Barbara Sudzus signed a consent to search form in a front office area outside the presence of Saadeh.)

It was undisputed that Imad Saadeh was an independent contractor who worked out of Euro-Tech (a 42,000 square foot auto repair facility), and did not receive a salary from Euro-Tech. Eight or nine tool boxes were in the workshop area of Euro-Tech; neither Barbara Sudzus

nor Euro-Tech owned these tool boxes. Mrs. Sudzus did not toil in Euro-Tech's workshop area. Barbara Sudzus did not possess the keys for, or have access to, the tool boxes.

In light of these facts, Barbara Sudzus clearly lacked authority to consent to a search of the toolbox since she lacked access to and use of it. *See United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974). The panel's holding to the contrary conflicts with the Seventh Circuit's observation in *United States v. Rodriguez*, 888 F.2d 519 (7th Cir. 1989), that a third party's general consent to search a room does not necessarily amount to a consent to search closed containers within the room. *Id.* at 523-24. Likewise, there is conflict between the holding in this case and *United States v. Welch*, 4 F.3d 761 (9th Cir. 1993), where the court declared, "The shared control of 'host' property does not serve to forfeit the expectation of privacy in containers within that property." *Id.* at 764. In *Welch*, the Court found that David McGee did not use, have joint access or control over Sharon Welch's purse. Therefore, according to *Welch*, in spite of McGee's consent to search the car in which Welch's purse was found, McGee lacked actual authority to consent to a search of Welch's purse.

In finding the warrantless search of the toolbox constitutionally permissible, the panel found that Saadeh's failure to object undercut his challenge to Barbara Sudzus' authority. *United States v. Saadeh*, 61 F.3d 510, 518 (7th Cir. 1995). This statement is out-of-sync with the actual facts since *Saadeh was not made aware that Barbara Sudzus had consented to a search!* Specifically, the agents did not obtain Barbara Sudzus' consent in Saadeh's presence, Saadeh was not shown the consent form and the

agents did not ask Saadeh if he would object to the search. While the panel stressed Saadeh's failure to object, *how was Saadeh to know that the agent was going to search the toolbox until the agent did so?*

The lower court in this case has set an extremely dangerous precedent. It requires a person to forfeit his Fifth Amendment privilege against self-incrimination (by making an admission to an interest in a container containing incriminating evidence) to assert his Fourth Amendment rights. This alone violates the doctrine of unconstitutional conditions. *See Simmons v. United States*, 390 U.S. 372 (1968). The panel's requirement also is ill-conceived because it assumes that a lay person understands niceties of Fourth Amendment law, i.e., that a search warrant could be required and objection made.

Further, the panel's attaching significance to Saadeh's failure to object conflicts with decisions from other courts which have deemed silence immaterial to consent. *See United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990) ("the government may not show consent to enter from the defendant's failure to object to entry"); *United States v. Most*, 876 F.2d 191, 199 (D.C. Cir. 1989) ("The government's inference of 'implied consent' appears to rest upon the fact that store employees did not impede the officer's search of the bag. It is clear, however, that for constitutional purposes nonresistance may not be equated with consent."); *Patzner v. Burkett*, 779 F.2d 1363, 1369 (8th Cir. 1985) ("consent cannot be presumed from the absence of proof that a person resisted police authority").

In addition, the doctrine of apparent authority, *Illinois v. Rodriguez*, 497 U.S. 177 (1990), cannot validate the

warrantless search of Saadeh's locked tool box. The district court intimated as much, stating, "[T]his court is hesitant to conclude that a reasonable officer could interpret a general consent to search a business premises to include the permission to open a locked toolbox in that premises." *United States v. Sudzus*, No. 92 CR 102, Mem. Op. & Order, 1992 WL 162959 *4 (N.D. Ill., July 2, 1992) (Aspen, J.).

This case is unlike usual apparent authority cases where a police officer relied upon a third party's untrue assertion of purported authority over searched property, and the question becomes whether such reliance was objectively reasonable. Here, the agents did not rely upon an individual's untrue assertions concerning access to and control over the item searched. Indeed, the agents, when seeking permission to search, did not ask Barbara Sudzus about the tool box, ascertain Barbara Sudzus' relationship to the tool box or secure her specific permission to search the tool box. As such, contrary to the panel's assertion, the searching agents could not have reasonably believed Barbara Sudzus had authority to consent to a search of the tool box since "[t]he agents simply did not have enough information to make that judgment." *United States v. Whitfield*, 939 F.2d 1071, 1074 (D.C. Cir. 1991). Given the agents' failure to secure enough information to allow them to rely upon an assertion of authority over the tool box, the government failed to carry its burden of justifying the search under the apparent authority doctrine. *Id.* at 1075. *See also United States v. Dearing*, 9 F.3d 1428, 1430 (9th Cir. 1993); 2 Wayne LaFave, Search and Seizure, § 8.3(g) (2nd ed. 1987) (police cannot

"proceed on the theory that 'ignorance is bliss.' "). Furthermore, the agents could not have reasonably inferred Barbara Sudzus' authority over the locked tool box since Sudzus made no such assertion, and no information suggested that Sudzus had access to or control over Saadeh's tool box. Thus, it would have been objectively unreasonable for the agents to have believed that Barbara Sudzus had common authority over the locked tool box. *See Dearing*, 9 F.3d at 1430 (agent's belief that caretaker also had apparent authority over defendant's bedroom was unreasonable); *Welch*, 4 F.3d at 765 (consent by defendant's companion to search a rental car used by companion and the defendant did not authorize a search of the defendant's purse found within the rental car on the basis of the apparent authority doctrine); *Whitfield*, 939 F.2d at 1075 (in spite of mother's consent to search her 29 year old son's room, agents could not reasonably infer that mother had mutual use of the closet containing son's clothing).

Based upon the foregoing, *certiorari* should be granted to correct the Seventh Circuit's plain misreading of the facts, to resolve the conflict between this and other cases and to extinguish a dangerous precedent that requires a lay person to know and understand Fourth Amendment law and sacrifice the Fifth Amendment privilege against self-incrimination to assert Fourth Amendment protection against unreasonable or warrantless search and seizure.

CONCLUSION

WHEREFORE, Petitioner Imad Naim Saadeh respectfully prays that this Honorable Court grant this petition and issue a writ of *certiorari* to review the judgment of the Seventh Circuit. In the alternative, Petitioner Imad Saadeh respectfully moves this Honorable Court to vacate the Seventh Circuit's judgment for further consideration in light of this Court's expected decision in *Thompson v. Keohane*, No. 94-6615, or grant any other appropriate relief.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Imad Naim SAADEH, Barbara Sudzus,
and Albert Sudzus,
Defendants-Appellants.

Nos. 93-2681, 93-2682 and 93-2705.

United States Court of Appeals,
Seventh Circuit.

Argued April 14, 1995.

Decided July 20, 1995.

Defendants were convicted in the United States District Court for the Northern District of Illinois, Eastern Division, Marvin E. Aspen, Chief Judge, of conspiracy to possess cocaine with intent to distribute, and they appealed. The Court of Appeals, Flaum, Circuit Judge, held that: (1) warrantless entry was justified by exigent circumstances; (2) defendant who monitored entry and exit of customers and employees of car repair shop had apparent authority to consent to search of premises; (3) such defendant's consent to search was voluntary; (4) consent to search included desk and tool box; (5) questioning of defendant was not an interrogation with meanig of *Miranda*; (6) prosecutor's comments in opening statement and closing argument did not deny defendants fair trial; (7) defendants were not entitled to new trial based on government's use of alleged perjured testimony; (8) defendants were not denied Sixth Amendment right to fair trial by presence of hearing-impaired juror; and (9) evidence was sufficient to support challenged conviction.

Affirmed.

Mark A. Flessner, Asst. U.S. Atty., Office of the U.S. Atty., Crim. Div., Chicago, IL, Barry Rand Elden, Asst. U.S. Atty. Office of the U.S. Atty. Crim. Receiving, Appellate Div., Chicago, IL, Sean Connelly (argued), U.S. Dept. of Justice, Crim. Div., Appellate Section, Washington, DC, for U.S.

Marc W. Martin, Terence P. Gillespie (argued), Genson, Steinback, Gillespie & Martin, Chicago, IL, for Imad Naim Saadeh.

Richard D. Trainor (argued), Reed, Scoby & Trainor, Ltd., Chicago, IL, for Barbara Sudzus.

Anthony Pinelli (argued), Chicago, IL, Anita Rivkin-Carothers, Chicago, IL, for Albert Sudzus.

Before ALDISERT,* BAUER and FLAUM, Circuit Judges.

FLAUM, Circuit Judge.

Defendants Imad Saadeh, Barbara Sudzus, and Albert Sudzus used a Chicago automobile repair shop as the center for their cocaine distribution business. After a successful drug bust by the Drug Enforcement Administration ("DEA"), a jury convicted all three defendants of violating 21 U.S.C. §§ 841(a)(1) and 846, conspiracy to possess cocaine with the intent to distribute. The defendants now raise a number of challenges to their convictions. For the reasons below, we affirm.

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* The Honorable Ruggero J. Aldisert, of the United States Court of Appeals for the Third Circuit, sitting by designation.

I.

Albert ("Al, Jr.") and his mother, Barbara Sudzus ("Barbara") ran a Chicago car repair shop called Euro-Tech. Al, Jr. and Barbara contracted out the use of work space in the Euro-Tech building to mechanics who worked as independent contractors. Imad Saadeh, who did not receive a salary from Euro-Tech, used the Euro-Tech facilities to work on his own cars and motorcycles. Like the other workers, he used a large cabinet-sized toolbox to store his tools and other personal items.

In 1987, Al, Jr. and his father purchased 3.4 kilograms of cocaine for $10,000 per kilogram at Euro-Tech from Robert Grinnell. Three years later, Grinnell met Saadeh at Euro-Tech. Saadeh informed Grinnell that "Al" (although Grinnell was unsure whether he was referring to Al, Jr. or his father) had introduced him to the cocaine business by loaning him $100 to make his first drug buy. Over time, Grinnell learned that Dickie Lynn and a man named Bishop assisted Saadeh in the cocaine business and that they used the Euro-Tech garage to count and store their drug proceeds. On two separate occasions in 1991, Grinnell purchased cocaine from Saadeh for personal use.

Following a 1992 arrest for burglary of an automobile, Grinnell agreed to assist the police with a narcotics investigation of the defendants by selling five kilograms for $10,000 each. The "reverse" sting took place over the next two days as follows: Grinnell made six recorded calls from a Schaumberg hotel and restaurant to Al, Jr. at Euro-Tech, claiming that he and a fellow thief, who in reality was undercover Agent Perille disguised as "Mike Mason," had again found cocaine in a car. Al, Jr.

initially expressed concern at Mason's presence but later agreed that Dickie would pick up the cocaine.

After two more calls on February 11, Al, Jr. and Grinnell agreed to complete the deal later that day at Euro-Tech. At 12:30 p.m., Barbara left Euro-Tech, climbed into a red Firebird registered to the company and drove slowly twice around the block. She then returned to the garage. Grinnell and Mason arrived at 1:00 p.m. While Mason waited inside the car, Grinnell entered Euro-Tech where Barbara "buzzed" him through the locked front security door. Grinnell told her that he had the five kilograms and Barbara replied, "That's good for you." Several minutes later, when Al, Jr. asked him whether he had brought "the dope," Grinnell responded that he would need at least $15,000 up front. Al, Jr. then made a call and informed Grinnell that Dickie was on his way. Barbara, after announcing that she was "gonna go check things out," again drove the Firebird several times around the block, carefully looking at Mason's car and a nearby surveillance van. Upon returning, Barbara asked who was in the car and Grinnell told her that it was Mason. Around 1:45 p.m., Saadeh, carrying a brown paper bag, exited a car and entered Euro-Tech with Dickie Lynn. After a brief conversation with Al, Jr. in his office, Saadeh and Dickie went to a toolbox on the work floor. Saadeh, Grinnell and Al, Jr. then went inside Al, Jr.'s office where Saadeh pulled three stacks of cash from his pocket, claiming they equalled $15,000, and placed them inside Al, Jr.'s desk drawer. Although Grinnell suggested that he would get the cocaine and they could complete the drug deal then and there, both Al, Jr. and

Saadeh objected, insisting that the deal should instead occur at a nearby yard.

DEA Agent William Maloney led a team of officers into Euro-Tech around 2:00 p.m. Upon entering the building, Maloney twice announced he was a federal agent. Barbara, still in the glass-enclosed office that controlled entry into the shop, refused to allow the police to enter and instead yelled: "Cops! The police are here." Maloney saw Saadeh running and instructed the police to break the glass door with their battering ram. Within ten minutes, the police had secured the building and directed everyone (except Barbara) into the garage area, where the police patted them down for safety purposes and ordered them to empty their pockets.

Informing Barbara that there may be drugs, guns or money in the building, Agent Maloney asked if she would consent to a search. Barbara told the agent that she had nothing to hide and signed a written consent form. The officers then searched the premises, finding three packages of currency totalling $15,000 in Al, Jr.'s desk drawer. Officer Michael Egan searched the garage work floor, where he found a toolbox with several locked drawers. Egan asked Saadeh if the toolbox was his and Saadeh responded affirmatively. Using keys that Saadeh had earlier removed from his pockets, Egan opened the toolbox and found bundles of currency totalling $35,000.

All three defendants were charged with conspiracy to possess cocaine with intent to distribute. Before trial, the defendants moved to suppress the currency under the Fourth Amendment. Saadeh also moved to suppress his statement about the toolbox, claiming that it had been

elicited in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). After an evidentiary hearing, the district court denied both motions. The court found that Barbara had at least apparent authority to consent to the search and that the officers did not exceed her consent in searching the toolbox. With regard to Saadeh's statement, the court held that assuming *arguendo* that Saadeh was in custody, the questioning was not an "interrogation" and therefore not in contravention of the Fifth Amendment.

A jury convicted all three defendants of the charged offense. The court sentenced Al, Jr. to 180 months imprisonment, Barbara to 121 months, and Saadeh to 160 months. This appeal followed.

II.

The defendants raise a number of issues on appeal. Barbara, Al, Jr. and Saadeh first contend that the district court erred in denying their motion to suppress evidence. Second, Saadeh argues that the district court erred in denying his motion to suppress his statement to the police officers. Third, the defendants maintain that they were denied a fair trial by prosecutorial argument and evidence of other crimes. Fourth, Saadeh contends that he was denied his due process, fair trial and confrontation rights when he was precluded from establishing that the government's primary witness had committed perjury. Fifth, the defendants claim that they were denied a fair trial by the presence of a hearing-impaired juror during

the trial and jury deliberations. Finally, Barbara challenges the sufficiency of the evidence supporting her conviction.

A.

The defendants challenge their convictions arising from the forced entry into the Euro-Tech premises, the warrantless search of the garage, and the seizure of evidence, as violative of the Fourth Amendment. Specifically, they maintain that the entry was unlawful, that Barbara did not voluntarily consent to the search, and that the scope of Barbara's consent did not include the desk drawer or the toolbox. They assert that the district court therefore should have suppressed the $15,000 recovered from Al, Jr.'s desk drawer and the $35,000 from the toolbox. We review a district court's decision on a motion to suppress for clear error. *United States v. Gilbert*, 45 F.3d 1163, 1165 (7th Cir.1995). Because of the highly fact-specific nature of a motion to suppress evidence, we give particular deference to the district court that had the opportunity to observe witnesses and hear testimony on the issue. *United States v. James*, 40 F.3d 850, 874 (7th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 948, 130 L.Ed.2d 891 (1995). We will only reverse if we are left with the definite and firm conviction that a mistake has been made, *Gilbert*, 45 F.3d at 1165; *United States v. Robinson*, 30 F.3d 774, 781 (7th Cir.1994).

The Fourth Amendment protects a person's right to be free from warrantless intrusions into his home, U.S. Const. amend. IV; *United States v. Foxworth*, 8 F.3d 540, 544 (7th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1414,

128 L.Ed.2d 85 (1994), and we have extended this protection beyond residences to cover businesses. *See United States v. Torres*, 751 F.2d 875, 883 (7th Cir.1984), *cert. denied*, 470 U.S. 1087, 105 S.Ct. 1853, 85 L.Ed.2d 150 (1985). Warrantless entries and searches are presumptively unreasonable absent exigent circumstances and certain other exceptions. *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); *Mason v. Godinez*, 47 F.3d 852, 855 (7th Cir.1995), *petition for cert. filed* (U.S. June 1, 1995) (No. 94-9540). Exigent circumstances exist when there is a compelling need for official action and no time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949-50, 56 L.Ed.2d 486 (1978); *Godinez*, 47 F.3d at 856. The government bears the burden of proving that "its agents had an objectively reasonable belief that exigent circumstances existed at the time of their warrantless entry into the defendant's [premises]." *United States v. Robles*, 37 F.3d 1260, 1263 (7th Cir.1994).

The defendants contend that the police should have obtained a warrant because no exigent circumstances existed that would otherwise justify their entry. We analyze the existence of exigent circumstances from the perspective of the officers at the scene, and ask not what the police *could* have done, but whether they had, at the time, a reasonable belief that there was a compelling need to act and no time to obtain a warrant. *See Foxworth*, 8 F.3d at 544. We repeatedly have held that the potential that evidence, especially drugs, will be destroyed gives rise to exigent circumstances. *Robles*, 37 F.3d at 1263; *United States v. Talkington*, 843 F.2d 1041, 1044 (7th Cir.1988).

In the instant case, the DEA's warrantless entry was justified by exigent circumstances. The agents approached Euro-Tech knowing that the defendants used the automobile shop as a center for drug activity. *Cf. Robles*, 37 F.3d at 1263. Grinnell's reports and information, police surveillance, and the recorded telephone conversations reliably led the police to this information. Grinnell also had told the police that he had seen guns at Euro-Tech on prior occasions and that Dickie Lynn always carried a gun. At the time of the entry, the undercover drug deal that was to occur at Euro-Tech had been altered, with the defendants unilaterally changing the location to a different yard owned by Al, Jr. This sudden shift in plans, coupled with Barbara's counter-surveillance, reasonably could have concerned the police and suggested that the defendants might be planning an armed "rip-off" of the cocaine.

Up to the point of entry, the officers had been able to arrange surveillance outside Euro-Tech. However, the officers had no way of knowing what awaited them inside. When they requested entry, Barbara shouted out warnings, raising the possibility that evidence would be destroyed or that the defendants would grab their guns. Behind the doors, the officers could see commotion and people running around. The officers were "facing circumstances that were rapidly progressing and, for the most part, out of their control," *Foxworth*, 8 F.3d at 544-45, and it was reasonable for them to believe that they needed to act immediately.

Having determined that the DEA officers legally entered Euro-Tech, we must now examine whether their subsequent search was justified by an exception to the

warrant requirement. *Robles*, 37 F.3d at 1264 (citing United *States v. Rivera*, 825 F.2d 152, 157 (7th Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987)). As we recently noted in *Robles*, "[t]he exigent circumstances only permitted their entry and securing of the residence, and once this was complete any threat of evidence being destroyed was eliminated. Therefore, we must continue our analysis of the seizure. . . . " 37 F.3d at 1264 (citations omitted).

After the police secured the premises, they returned to Barbara and asked for her consent to their search. Barbara told Agent Maloney that she had nothing to hide and signed a written consent form. The form, entitled "CONSENT TO SEARCH," stated: "1. I have been asked to permit special agents of the drug enforcement administration to search . . . 2. I have not been threatened nor forced in any way. 3. I freely consent to this search."

The district court concluded that Barbara voluntarily consented to the search and found that "the facts as adduced at the suppression hearing support the conclusion that Barbara Sudzus possessed apparent authority to consent to the search of Euro-Tech." The court also found that the search did not exceed the scope of Barbara's consent. The defendants challenge these findings, arguing that Barbara did not have the authority to consent to a search and that even if she did, her consent was tainted by the prior forcible entry. Because the prior forcible entry did not run afoul of the Fourth Amendment, we turn to the issue of Barbara's authority to consent. The government bears the burden of proving by a preponderance of the evidence that consent was freely and voluntarily given. *United States v. White*, 979 F.2d 539, 542

(7th Cir.1992); *United States v. Duran*, 957 F.2d 499, 502 (7th Cir.1992). We review the district court's determination of Barbara's consent for clear error. *United States v. Kozinski*, 16 F.3d 795, 810 (7th Cir.1994).

While a warrantless entry for the purpose of conducting a search ordinarily violates the Fourth Amendment, *see Payton*, 445 U.S. at 585, 100 S.Ct. at 1379, a well settled exception to this general rule permits authorities to conduct a search without a warrant if they obtain voluntary consent either from the individual whose property is to be searched, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), from a third party possessing common authority or joint control over the premises, *Florida v. Jimeno*, 500 U.S. 248, 249-50, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991); *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), or from an individual with the apparent authority to consent to the search. *Illinois v. Rodriguez*, 497 U.S. 177, 187, 110 S.Ct. 2793, 2800-01, 111 L.Ed.2d 148 (1990).

We conclude that the district court did not err in finding that Barbara had the requisite apparent authority to consent to the search. In *Rodriguez*, the Supreme Court held that apparent authority could provide a basis for consent when the police, at the time of the search, reasonably believed that that person had common authority over the premises, even though the person did not in fact possess such authority. 497 U.S. at 188, 110 S.Ct. at 2801. To assess whether apparent authority exists, we look for indicia of actual authority. *See United States v. Rosario*, 962 F.2d 733, 737 (7th Cir.1992) (citing *United States v. Miller*, 800 F.2d 129, 134 (7th Cir.1986)). As the district court specifically found, and the record more than supports, as

the agents entered the premises, they first encountered Barbara behind the window next to the door. She clearly monitored the entry and exit of customers and employees. Furthermore, she informed Agent Maloney that she maintained control over the premises, including access into the building. "The question is not who comes to the door so much as it is whether whoever appears there projects an aura of authority upon which one can reasonably rely." *Rosario,* 962 F.2d at 738. Barbara's physical placement, her statements, her known relationship to Al, Jr., and the officer's knowledge of her control over entry into and exit from the premises made it reasonable for the police to believe she had the authority to consent to the search of the premises. *See United States v. Chaidez,* 919 F.2d 1193, 1201 (7th Cir.1990), *cert. denied,* 501 U.S. 1234, 111 S.Ct. 2861, 115 L.Ed.2d 1028 (1991).

We also require the government to prove by a preponderance of the evidence that someone who consents to a search does so freely and voluntarily. *See Schneckloth,* 412 U.S. at 222, 93 S.Ct. at 2045; *United States v. Durades,* 929 F.2d 1160, 1163 (7th Cir.1991). We look to the totality of the circumstances to determine whether consent arose from coercion and duress, or from voluntariness. *Rosario,* 962 F.2d at 738; *United States v. McGuire,* 957 F.2d 310, 314 (7th Cir.1992); *United States v. Quinones-Sandoval,* 943 F.2d 771, 773 (7th Cir.1991). We will not reverse the finding of the district court on voluntariness unless it is clearly erroneous. *Rosario,* 962 F.2d at 738.

The defendants argued that Barbara's consent was not voluntary because: (1) the officers informed her that if she did not sign the consent form they would come back with a warrant; (2) the agents did not advise Barbara of

her right to refuse to consent; and (3) the agents did not ask Barbara for consent until after they had searched the building and recovered the currency. The totality of circumstances, however, supports the district court's finding that the agents voluntarily obtained Barbara's consent to the search. The agents never threatened Barbara with the availability of a search warrant, *cf. White*, 979 F.2d at 542, and the police were not constitutionally required to advise Barbara that she had the right to refuse a search before procuring her consent, so their failure to do so presents no problem. *United States v. Betts*, 16 F.3d 748, 754 (7th Cir.1994). Furthermore, the consent form that Barbara signed explicitly stated: "I have not been threatened nor forced in any way . . . I freely consent to this search."

We are thus left with the issue of the scope of Barbara's consent. The defendants argue that even if Barbara's consent to the general premises was legal, her consent did not extend to the desk and toolbox. We first must determine the scope of Barbara's initial consent. *See United States v. Maldonado*, 38 F.3d 936, 939 (7th Cir.1994). The scope of a search generally is characterized by its expressed object. *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1803-04; *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Maldonado*, 38 F.3d at 939. We apply a standard of "objective reasonableness," asking how a reasonable person would have understood the conversation between the law enforcement officer and the criminal suspect. *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1803-04; *United States v. Torres*, 32 F.3d 225, 231 (7th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 912, 130 L.Ed.2d 794 (1995);

United States v. Dorsey, 27 F.3d 285, 290 (7th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 949, 130 L.Ed.2d 892 (1995).

"A lawful search of fixed premises generally extends to the entire areas in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *Ross*, 456 U.S. at 820-21, 102 S.Ct. at 2170. In the instant case, Barbara had apparent authority over the whole premises, including the toolbox and desk containing the money. *Cf. United States v. Lechuga*, 925 F.2d 1035, 1042 (7th Cir.1991) (general consent to search apartment includes consent to search suitcase located in a closed closet). Agent Maloney expressly informed her that the agents were looking for "money, narcotics and guns." The toolbox and desk drawer clearly were big enough to contain these items and Barbara did not put any express limitation on the scope of her consent.

Finally, we note that Saadeh did not object to the search of his toolbox. In fact, he stood by and watched quietly as the agent opened it. That lack of protest undercuts a defendant's later challenge to a third party's authority to consent. *Cf. Torres*, 32 F.3d at 231 ("Rather than withdrawing or limiting the broad and all-inclusive consent previously given, [the defendant] stood by silently as [the officer] called for, received, and used a screwdriver to open the wooden box"); *see also United States v. Martel-Martines*, 988 F.2d 855, 858 (8th Cir.1993) (defendant's "failure to object [to search] made it objectively reasonable for the officers to conclude that his general consent to search the truck included consent to access the compartment in a minimally intrusive manner").

Thus, the district court's denial of the defendants' motions to suppress the seized money was not clearly erroneous. The initial warrantless entry was justified by exigent circumstances and Barbara consented to the subsequent search, which consent included not only the general premises, but also the desk and toolbox.

B.

Saadeh next argues that the district court erred in denying his motion to suppress his statement to the police that the toolbox was his. At trial, Saadeh objected to the admission of this statement on the grounds that he was in custody when he made these statements but had not been read his *Miranda* rights. The district court rejected this contention, concluding that the questioning did not amount to an interrogation and therefore did not require such warnings. We review the district court's denial of a motion to suppress for clear error. *United States v. Burns*, 37 F.3d 276, 278 (7th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2592, 132 L.Ed.2d 840 (1995); *United States v. McCarthur*, 6 F.3d 1270, 1275 (7th Cir.1993). Because questions arising under the Fourth and Fifth Amendments are primarily factual, "we give particular deference to the district court that had the opportunity to hear the testimony and observe the demeanor of the witnesses." *Id.*

In order to protect a citizen's right against self-incrimination, the Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966), that suspects must be read certain warnings before

they are subjected to a "custodial interrogation." A suspect must be both "in custody" and subject to "interrogation" in order to trigger the *Miranda* protections. If a suspect is taken into custody or otherwise deprived of freedom of action and is questioned without being informed of these rights, his responses may not be introduced into evidence to establish his guilt. *Berkemer v. McCarty*, 468 U.S. 420, 429, 104 S.Ct. 3138, 3144-45, 82 L.Ed.2d 317 (1984); *United States v. Smith*, 3 F.3d 1088, 1096 (7th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 733, 126 L.Ed.2d 696 (1994).

The government concedes on appeal that the questioning of Saadeh amounted to an interrogation. Because Saadeh was not advised of his *Miranda* rights prior to his formal arrest, we must determine whether he was in custody for *Miranda* purposes when the officers spoke with him. In making the custody determination, we look to how a reasonable person in the suspect's position would have understood his situation. *Berkemer*, 468 U.S. at 442, 104 S.Ct. at 3151. This inquiry is based on the totality of the circumstances, *Burns*, 37 F.3d at 280; *United States v. Fazio*, 914 F.2d 950, 954 (7th Cir.1990), including the place and length of the questioning as well as the accused's freedom to leave the scene.

As we recently noted in *Burns*, 37 F.3d at 280, we look to Fourth Amendment jurisprudence, beginning with *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), to make this "in custody" determination. *See, e.g., Berkemer*, 468 U.S. at 435, 104 S.Ct. at 3147-48 (analogizing to *Terry* in addressing the issue of whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered custodial interrogation).

Relying on *Berkemer*, we have held that *Miranda* warnings are not required where a suspect has been detained pursuant to a *Terry* investigatory stop. *See Burns*, 37 F.3d at 281 (citing *United States v. Boden*, 854 F.2d 983, 995 (7th Cir.1988)). Similarly, because detentions pursuant to the execution of a search warrant are "substantially less intrusive than an arrest," *Michigan v. Summers*, 452 U.S. 692, 702, 101 S.Ct. 2587, 2594, 69 L.Ed.2d 340 (1981), a suspect who is detained during the execution of a search warrant has not suffered a restraint on freedom of movement of the degree associated with a formal arrest, and therefore is not "in custody." *Burns*, 37 F.3d at 281 (citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983)). In *Burns*, we explained:

> Most detentions that occur during the execution of a search warrant, like most *Terry* stops, are "comparatively nonthreatening." They are often short in duration. Moreover, such detentions are "surely less intrusive than the search itself." . . . *Therefore, we conclude that, in the usual case, a person detained during the execution of a search warrant is not "in custody" for purposes of Miranda.*

37 F.3d at 281 (emphasis added).

Like the defendant in *Burns*, Saadeh was not detained for an unreasonably long period of time prior to his eventual arrest. The officers did not handcuff or physically restrain him in any way until they formally placed him under arrest. The verbal exchange between him and the officer took place shortly after their entry. At the time he was questioned, Saadeh had been treated no differently from other building occupants, all but two of whom

were ultimately released and not prosecuted. As Saadeh stipulated, he was not under arrest. Moreover, Saadeh was not the isolated target of any directed questioning; in fact, the officer who asked the question did not even know Saadeh's identity at the time he posed the question. Finally, the officer's questioning was limited in scope and duration – a single question. Although Saadeh contends that he was not free to leave at any time, this subjective belief is not by itself the standard for *Miranda* warnings.

A person detained during the execution of a search warrant is normally not in custody for *Miranda* purposes. In light of the totality of the circumstances, Saadeh's temporary detention did not amount to the functional equivalent of an arrest. The district court did not err in its denial of Saadeh's motion to suppress.

C.

The defendants also maintain that they were denied a fair trial by improper prosecutorial argument and evidence of other crimes. They first challenge portions of the prosecutor's opening statement and closing argument. They contend that the prosecution's statements misled the jury, created unfair surprise, and violated the district court's pre-trial order.

In its pre-trial order, the district court stated that it would not allow the government, in its case-in-chief, to introduce testimony about "events involving transactions between people other than those involved in the indictment." The order allowed, however, "evidence of specific sales at Euro-Tech between January of 1990 and February

of 1992, that Grinnell was able to testify from his personal knowledge that occurred at Euro-Tech."

In its opening statement, over objection, the government told the jury that after Grinnell left prison in 1990, he visited Euro-Tech, where he saw Saadeh and two others selling cocaine "on a daily basis." The prosecutor (Flessner) related to the jury that they would hear about the cocaine business run by Saadeh, Dickie Lynn, and Bishop. Flessner informed the jury that the government would present testimony regarding the day-to-day workings of Saadeh's cocaine business, including the use of beepers, money counting at the garage, and the hiding of the money in his toolbox. The prosecution also promised the jury that they would hear evidence regarding Barbara and Al, Jr.'s involvement, including their presence and awareness of the business and their cooperation.

Again, in closing argument, the prosecutor pressed the theme that the defendants were operating an ongoing, daily drug sale enterprise out of the Euro-Tech garage. Commenting on Barbara's counter-surveillance measures, the government argued: "She was troubled by [the presence of the van] because she's a pro. She knows how these things happen. These people have been doing this for years, since 1987 at least. They know what goes on. That was a police van." When defense counsel objected, the court stated: "Ladies and gentlemen, you have heard the evidence. Disregard anything to the contrary."

We will not lightly overturn a conviction "on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's

conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1984); *see also United States v. Neely*, 980 F.2d 1074, 1083 (7th Cir.1992); *United States v. Ferguson*, 935 F.2d 1518, 1530 (7th Cir.1991). We will reverse a conviction only if we find that the prosecutor's rhetoric invoked facts not in evidence and deprived the defendant of a fair trial, in violation of his due process rights. *United States v. Waldemer*, 50 F.3d 1379, 1383 (7th Cir.1995), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2598, 132 L.Ed.2d 845 (1995); *United States v. Rutledge*, 40 F.3d 879, 888 (7th Cir.1994), *cert. granted*, ___ U.S. ___, 115 S.Ct. 2608, 132 L.Ed.2d 852 (1995); *United States v. Martinez*, 939 F.2d 412, 415 (7th Cir.1991).

This court's review of a claim of prosecutorial misconduct follows a bifurcated analysis. First, this court examines the challenged remark in isolation to determine whether it was improper. If the court concludes that the remark was improper, it evaluates the remark in light of the entire record to determine whether the comment deprived the defendant of a fair trial. *United States v. Spivey*, 859 F.2d 461, 465 (7th Cir.1988). In addressing a claim of prosecutorial misconduct, we recently noted:

> In looking at the entire record, we take into account such considerations as the nature and seriousness of the prosecutor's statements, whether the prosecutor's statements were invited by conduct of defense counsel, whether the court gave a curative instruction, whether defense counsel had an opportunity for rebuttal, and the weight of the evidence against the defendants.

United States v. Jean, 25 F.3d 588, 597 (7th Cir.1994); *see also Neely*, 980 F.2d at 1084. Prosecutors cannot infuse their closing arguments with facts that the court has not admitted into evidence, but they may argue reasonable inferences from the evidence that the jury has seen and heard. *Waldemer*, 50 F.3d at 1383.

In the instant case, in its opening statement, the government accurately predicted the expected testimony regarding Saadeh's daily drug activities. On direct examination, Grinnell testified that Saadeh sold cocaine out of Euro-Tech, that Grinnell and his two accomplices would receive beeper calls there, would return calls there and then leave, only to return a short time later with cash they placed in Saadeh's toolbox. He testified that he saw Saadeh place money in the toolbox several times each day. Moreover, the district court gave the jury several cautionary instructions prior to the opening statement and closing argument, reminding the jury to consider only the evidence presented and not the attorneys' characterizations. At the outset of the trial, the court cautioned the jury that "during the course of the statements if [attorneys] say something which later the evidence shows is otherwise, you are to follow your own recollection of the evidence and disregard anything that any attorney has said to the contrary." Similarly, the court's final jury charge stressed that "[o]pening statements, closing arguments and other statements of counsel should be disregarded to the extent they are not supported by the evidence." In that we presume a jury to follow the court's instructions, *see United States v. McAllister*, 29 F.3d 1180, 1187 (7th Cir.1994), we have no reason to believe (and the defendants have not offered

anything to suggest) that the jury improperly relied on the arguments.

Additionally, the defendants maintain that the government's use of Grinnell's testimony created unfair surprise and violated the court's pre-trial order. In that the government notified the defendants and the court of its intentions to introduce this evidence (which in fact led directly to the pre-trial order), the defendants' surprise argument is wholly without merit. Furthermore, if there were any ambiguity as to the extent of the pre-trial order, the district court was in the best position to interpret its own order, which it did, concluding that this inquiry was permissible.

The defendants also assert that the government improperly implied that Barbara had been involved in prior criminal activity with the remark that: "[S]he's a pro. She knows how these things happen. These people have been doing this for years, since 1987 at least." When defense counsel objected, the district court instructed that the jurors had listened to the evidence and should disregard anything to the contrary. Upon stipulation by both parties, the court also provided a jury instruction that stated:

> The government in its closing argument has inferred that the defendants have been involved in drug activities since 1987. The Court sustains defendants' objections to this argument and orders any such inference in the argument stricken. The defendants are on trial solely for the charges in the indictment. You should consult the other instructions of law as to what effect you should give evidence of wrongdoing

> not charged in the indictment that you may have heard during the trial. The arguments or statements of an attorney is [sic] not evidence.

Any prejudice that may have resulted from the government's argument was thus cured, for "[a]ny effect adverse to [defendants] from the prosecutor's statements must be presumed to have been negated by the court's curative instruction." *United States v. Easley*, 994 F.2d 1241, 1246 (7th Cir.1993).

The defendants finally argue that Grinnell testified, on redirect examination, that he had stolen cars at the direction of Al, Jr., and that he had brought them to Euro-Tech for "chopping." This testimony came as a result of defense counsel's impeachment of Grinnell for being a car thief and defense counsel's claim that Grinnell operated his own "chop shop." Evidence of other crimes or bad acts cannot be used to prove that a defendant committed the crime charged simply because he has committed a crime in the past. *See* Fed.R.Evid. 404(b). However, when a defendant impeaches a witness with his prior bad acts, he is deemed to have "opened the door," and the witness may testify as to the defendants' involvement in that conduct. *See, e.g., United States v. Prevatte*, 16 F.3d 767, 776-77 n. 8 (7th Cir.1994); *United States v. Touloumis*, 771 F.2d 235, 241 (7th Cir.1985) ("When a party elicits testimony as to only part of a transaction during cross-examination, the opposing party is permitted to elicit testimony as to the whole transaction on redirect examination in order to advise the jury fully of all the facts surrounding the case."). Thus the district court did not abuse its discretion in permitting Grinnell to testify about

Al, Jr.'s involvement in the crimes that defense counsel used to impeach Grinnell.

D.

Saadeh also maintains that the district court denied him his due process, fair trial, and confrontation rights when it precluded him from establishing that the government's primary witness had committed perjury during direct examination where the government failed to rectify the false testimony. Saadeh argues that Grinnell's testimony regarding Saadeh's drug transactions were perjured and that the government knowingly proffered this testimony. Specifically, Saadeh sought to show that Grinnell was incarcerated at the time that he claimed he was with Saadeh at Euro-Tech.

Grinnell testified that he visited Euro-Tech on a "daily basis" starting in 1990 and that he met Saadeh that summer and discussed Saadeh's drug business a month later. He also testified that while at Euro-Tech, he witnessed Saadeh counting significant amounts of cash. Over Saadeh's objections, he testified that Saadeh sold cocaine at Euro-Tech and that Saadeh had explained to him the details of the cocaine business. Grinnell also attested that between mid-summer 1990 and February, 1992 he observed Saadeh place money in a toolbox three or four times a day. After repeating this testimony on cross-examination, defense counsel produced a Cook County jail record showing that Grinnell was imprisoned between August 22, 1990, and June 21, 1991. The court sustained objections to this document. The cross-examination of Grinnell continued and, over the government's

repeated objections, defense counsel elicited testimony that Grinnell was in Cook County jail from August 22, 1990 through June 21, 1991 on a parole violation and therefore could not have been at Euro-Tech during that period.

Based on this testimony, Saadeh filed a motion for a mistrial arguing that Grinnell's false testimony was reasonably ascertainable from the records available to the government, including the court file relating to the cases for which Grinnell was incarcerated, his rap sheet, the jail history card, and the bond slip. The court denied this motion and permitted redirect examination of Grinnell. On redirect, Grinnell testified that he did not mean to imply to the jury that while he was in jail he was also visiting Euro-Tech. Saadeh now challenges the district court's rulings on his objections as well as the denial of his mistrial motion.

We give considerable deference to the evidentiary rulings of the district court because it has the best opportunity to observe the witness and weigh his credibility. *United States v. Adcox*, 19 F.3d 290, 295 (7th Cir.1994). We will only reverse evidentiary rulings if the court abused its discretion. *Id.* Likewise, we review the denial of a motion for a new trial based on the prosecutor's alleged use of perjured testimony under an abuse of discretion standard and "will not disturb the trial court's ruling on the motion unless there has been an error as a matter of law or a clear and manifest abuse of judicial discretion." *Id.* (internal quotation omitted); *United States v. Douglas*, 874 F.2d 1145, 1159 (7th Cir.), *cert. denied*, 493 U.S. 841, 110 S.Ct. 126, 107 L.Ed.2d 87 (1989).

In order to receive a new trial on the basis of the government's use of allegedly perjured testimony, the defendant must establish that: (1) the prosecution's case included perjured testimony; (2) the prosecution knew, or should have known, of the perjury; and (3) there is a likelihood that the false testimony affected the judgment of the jury. *Adcox*, 19 F.3d at 295; *United States v. Verser*, 916 F.2d 1268, 1271 (7th Cir.1990); *Douglas*, 874 F.2d at 1159 (citing *Napue v. Illinois*, 360 U.S. 264, 269-71, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). We have repeatedly held, however, that "[m]ere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." *Verser*, 916 F.2d at 1271. Rather, "the alleged perjured testimony must bear a direct relationship to the defendant's guilt or innocence." *Adcox*, 19 F.3d at 295. Finally, when a defendant alleges that the prosecution used perjured testimony, we must inquire into whether the defendant had adequate opportunity to expose the alleged perjury on cross-examination. *Id.*; *United States v. Santiago*, 798 F.2d 246, 247 (7th Cir.1986).

Saadeh has failed to provide any evidence that Grinnell committed perjury, much less that the government knew or should have known he was perjuring himself. While Grinnell's testimony contained contradictory statements and ambiguities, they do not rise to a level of perjury but are mere inconsistencies. *Cf. Adcox*, 19 F.3d at 296. Even assuming that Grinnell perjured himself and that the government knew of such perjury, Saadeh has not proven that there is a likelihood that the false testimony affected the judgment of the jury. Saadeh has not produced any evidence to suggest that a jury might have

convicted him based on Grinnell's testimony about Saadeh's past trafficking rather than because of Saadeh's extensively proven involvement in the charged crime. Saadeh has provided no evidence that the alleged perjured testimony was directly related to the defendant's guilt or innocence in the crime charged. Grinnell's inconsistencies speak only to Grinnell's presence at Euro-Tech and his dating of some of the events. The inconsistencies did not show that Grinnell perjured himself in testifying that Saadeh trafficked drugs at Euro-Tech.

Finally, Saadeh had an ample opportunity, of which he took advantage, to cross-examine Grinnell during the trial, discredit him, and expose any alleged perjury. *Cf. Adcox*, 19 F.3d at 296; *United States v. Langston*, 970 F.2d 692, 700-01 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 439, 121 L.Ed.2d 358 (1992). The trial court's exclusion of Grinnell's jail records did not prevent defense counsel from proving his incarceration and then pointing out the inconsistencies between his presence in jail and his testimony placing him at Euro-Tech. Saadeh's counsel elicited responses from Grinnell highlighting the inconsistencies on several occasions. During his closing argument, defense counsel also made full use of this impeachment, forcefully noting that Grinnell "out-and-out lied to each one of you," "committed perjury," "committed out-and-out perjury in front of you fine people," and "on top of all his character flaws he out-and-out lied to you people."

Thus, applying the *Adcox* approach, it is clear that the court did not abuse its discretion in denying Saadeh's mistrial motion and ruling on the government's objections.

E.

All three defendants maintain that they were denied their Sixth Amendment right to a fair trial by the presence of a hearing-impaired juror during the trial and jury deliberations. During voir dire, the juror responded fully to all individual questioning about his education, work and family background.[1] During the post-verdict polling, however, that the following exchange took place:

> THE CLERK: The jury will be polled. Ladies and gentlemen of the jury, the clerk will ask you the question, if this was and is this your verdict, will ask you individually by name. And then at the conclusion of asking you individually by name, will ask you in the aggregate if this was and is your verdict.
>
> THE CLERK: Okay. [to juror] . . . Was this and is this now your verdict.
>
> (Brief Pause)
>
> THE COURT: Either respond yes or no.
>
> (Brief Pause)

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[1] The defendants note that during voir dire examination, the court asked a general question of the venire: "May I assume then that each and every one of you as you sit here now are willing and able to give this case your close attention and to give both sides a fair trial? Does anybody feel that for any reason he or she cannot do that?" There was no response to this question. The defendants raise the possibility that the juror may not have heard this question. Without any additional evidence, and in light of the form of the court's question, which did not call for a response unless a potential juror felt he or she could not give both sides a fair trial, we will assume that the juror heard the question.

THE MARSHAL: He is hard of hearing, Judge.

THE CLERK: Was this and is this now your verdict?

JUROR: You want me to announce mine?

THE COURT: Was this and is this now your verdict? Yes or no?

JUROR: No.

THE COURT: Would you step forward, sir?

(The juror had a discussion off the record with another juror.)

JUROR: Yes, it's my verdict.

THE COURT: Wait a minute. Come out of the jury box and stand right there and listen to the question and either reply yes or no.

(The juror complies.)

THE CLERK: Was this and is this now your verdict.

(Brief pause.)

THE CLERK: Was this and is this now your verdict.

JUROR: My verdict is here, not guilty.

THE COURT: Pardon?

JUROR: Guilty. I can't – I don't understand you.

THE COURT: The clerk is asking you, she is polling you, if the verdict forms that were read, is that your verdict, the verdict forms –

JUROR: Yes.

THE COURT: The verdict forms found all three defendants guilty. Was that your verdict?

JUROR: Yes.

THE COURT: All right. You can return to the jury box.

The defendants, relying on *Commonwealth v. Brown*, 231 Pa.Super. 431, 332 A.2d 828 (1974) and *Wisconsin v. Turner*, 186 Wis.2d 277, 521 N.W.2d 148 (1994), assert that the juror not only must have missed portions of the trial testimony, but also could not fully assess the credibility of the witnesses because tonal quality, volume and speech patterns give clues to whether a witness is telling the truth. *See Turner*, 521 N.W.2d at 150. They maintain that because a substantial portion of the government's case relied on the credibility of Grinnell, the juror could not render a fair verdict.

Brown and *Turner* do not stand for the proposition that the mere presence of some evidence indicating a hearing impairment per se disqualifies a juror and impeaches a verdict. *Brown* requires a showing that "the deafness is of such degree as to indicate that the juror may not have heard material testimony," 332 A.2d at 831, and *Turner* requires a showing that "a juror missed material testimony." 521 N.W.2d at 151. The defendants have established neither. Moreover, although the post-verdict polling process suggests that the juror may have suffered some hearing difficulties in this discourse with the district court, the defendants failed to seek any opportunity to offer proof before the district court that the juror was unable to hear the evidence proffered at trial or during

the jury's deliberations. For these reasons, the defendants are not entitled to a new trial.

F.

Finally, Barbara asserts that the government presented insufficient evidence with which to convict her. We will uphold a jury verdict against a defendant if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979) (emphasis in original). As we have stated before, this standard places a heavy burden on the defendant challenging the sufficiency of the evidence. *United States v. Theodosopoulos*, 48 F.3d 1438, 1449 (7th Cir.1995).

To prove Barbara guilty of a drug conspiracy, the government must have shown beyond a reasonable doubt that: (1) a conspiracy existed; (2) Barbara knew of the conspiratorial agreement; and (3) she intended to join it. *Theodosopoulos*, 48 F.3d at 1449; *James*, 40 F.3d at 864. This burden is met by proving the existence of a conspiracy and a participatory link with the defendant. *United States v. Crowder*, 36 F.3d 691, 695 (7th Cir.1994).

To establish that a particular defendant was member of a conspiracy, the government must present "substantial evidence that [the] defendant knew of the illegal objective of the conspiracy and agreed to participate in its achievement." *James*, 40 F.3d at 865 (quoting *United States v. Burrell*, 963 F.2d 976, 987 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 357, 121 L.Ed.2d 270 (1992)). Although the jury may not reach its verdict simply by piling inference

upon inference, *United States v. Martinez*, 937 F.2d 299, 304 (7th Cir.1991), the government may prove the defendant's participatory link to the conspiracy solely by way of circumstantial evidence. *United States v. Townsend*, 924 F.2d 1385, 1390 (7th Cir.1991). Thus, while mere presence is not enough by itself to convict a defendant, *see United States v. Cochran*, 955 F.2d 1116, 1123 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 460, 121 L.Ed.2d 368 (1992), this presence, along with other evidence indicating that the presence or act was intended to advance the ends of the conspiracy, suffices. *See United States v. Carson*, 9 F.3d 576, 587 (7th Cir.1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 135, 130 L.Ed.2d 77 (1994); *Cochran*, 955 F.2d at 1123; *United States v. Simone*, 931 F.2d 1186, 1193 (7th Cir.), *cert. denied*, 502 U.S. 981, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991).

Barbara contends that the evidence submitted to the jury regarding her involvement in the alleged conspiracy was insufficient because the government failed to prove a participatory link between her and the alleged conspiracy and because no evidence supported the claim that she intended to participate and associate herself with a criminal design and purpose. The record tells a different story. First, her acts of counter-surveillance were sufficient to prove her membership in the conspiracy. *James*, 40 F.3d at 850 ("An overt act of counter-surveillance to ensure that a drug deal takes place . . . permits a rational jury to conclude that the parties involved agreed to work together to achieve the conspiracy's criminal aim."); *United States v. Sanchez-Galvez*, 33 F.3d 829, 834 (7th Cir.1994) ("since any overt act in furtherance of a conspiracy may be considered evidence of participation in the conspiracy and since counter-surveillance is an overt act

which furthers the aims of a drug trafficking conspiracy, evidence of counter-surveillance alone should be sufficient to support a conspiracy conviction."). The police testified that Barbara had been seen conducting counter-surveillance of Euro-Tech prior to Grinnell's arrival, and after Grinnell entered, Barbara stated she was "gonna go check things out," at which point she climbed into her car and drove very slowly three times around the block, looking closely at "Mike Mason's" car and the surveillance van. Second, Grinnell testified that after Barbara "buzzed" him through Euro-Tech's locked front door, he told her that he had found five kilograms of cocaine in a car, and she responded "That's good for you." Finally, when the police arrived at the garage's entrance, Barbara denied them entry and called out "Cops! The police are here." These three actions provided sufficient evidence to sustain her convictions.

For the foregoing reasons, the district court's decision is AFFIRMED.